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No. 87-6700

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

JUN 29 PAGE 15

PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner, JOHN HENRY SELVAGE, through his undersigned counsel, respectfully submits this supplemental memorandum in light of the Court's recent disposition of the case of Franklin v. Lynaugh, No. 87-5546.

1. On June 22, 1988, this Court, by a vote of 6 to 3, rejected Donald Franklin's claim that the Texas capital sentencing statute, as applied to him, violated the Eighth Amendment because it precluded consideration of evidence in mitigation. The Court concluded that no evidence that could properly be characterized as "mitigating" had been precluded from consideration. However, a majority of the Court (those in dissent and those concurring with the judgment) also acknowledged that there are cases involving evidence in mitigation different from that presented in Franklin where the statute would function to limit the jury's ability to give mitigating effect to the evidence, in violation of the Eighth Amendment. Mr. Selvage's case is just such a case.

2. The concurring opinion specifically points to evidence directly related to the personal culpability of the criminal defendant that the jury must be allowed to consider in assessing punishment in a capital case. (Slip op. at 4). The opinion cites "[e]vidence of voluntary service, kindness to others, or of religious devotion" as examples of evidence which "might demonstrate positive character traits that might mitigate against the death penalty" and thus must not be precluded from the jury's consideration. There was evidence in Mr. Selvage's case that he was a well-behaved child and good student from a very close, religious family, and that he had not been in trouble until he returned from military service, where he had developed an addiction to heroin. (See petition for writ of certiorari at pp. 4-5). Subsequent investigation also revealed that Mr. Selvage had a history -- well-documented by the time of the offense in Air Force and prison medical records and subsequent to the offense by the respondent's records -- of psychosis and paranoid schizophrenia. It is not uncommon for people with this kind of psychiatric history to turn to drugs in an attempt at self-medication.

3. The Texas statute served to limit the jury's consideration of Mr. Selvage's mitigating evidence in two ways. First, the evidence before the jury of Mr. Selvage's exemplary background before his military service and his subsequent and tragic addiction to drugs had no relevance to the issues of deliberateness or future dangerousness, and thus could not be given independent mitigating effect. Second, the sentencing procedure utilized by Texas created a situation where the jury was not given relevant information in mitigation, because there was no way for the information to be given mitigating, rather than exclusively aggravating, effect. Counsel for Mr. Selvage made the reasonable judgment based on their experience that "it was rare for jurors to find mental illness so incapacitating as to interfere with a defendant's ability to commit deliberate acts" and thus answer the question of deliberateness negatively, and that any evidence of incurable mental disease or defect would be extremely damaging, because the state routinely produced

psychiatric witnesses who would convert any evidence of any mental disease or defect into evidence of likely future dangerousness. (See quote from counsel's affidavit at petition pp. 6 - 7). Thus, this powerful evidence of reduced moral culpability was neither investigated nor presented.

4. The effect of the statute on counsel's investigation and preparation is an issue not decided by the Court in Franklin, but is essentially the same as an issue presented to this Court in Hitchcock v. Dugger, 481 U.S. ___, (1987). The Court did not decide the issue in Hitchcock, because the case was reversed on other grounds. The issue is one that is likely to recur in the context of the Texas death sentencing scheme.

WHEREFORE, for all the reasons stated above, and all the reasons presented in the petition for writ of certiorari, John Henry Selvage respectfully requests that certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit denying habeas corpus relief in this case.

Respectfully submitted,

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By Richard H Burr III

* Counsel of record

Certificate of Service

I, Richard H. Burr, III, a member in good standing of the Bar of the Court, hereby certify that the foregoing Supplemental Memorandum in Support of Petition for Writ of Certiorari has been served upon respondent by sending a copy, via first class mail, to his counsel, Jim Mattox, Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, this 24th day of June 1988.

Richard H Burr III
Richard H. Burr, III